

ORIGINAL

No. 80472-9

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**
(COURT OF APPEALS No. 35247-8-II)

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents,

v.

WEYERHAEUSER COMPANY,
a Washington corporation,

Petitioner.

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT.....	3
A.	Standard of Review.	3
B.	This Court Should Affirm the Court of Appeals’ Holding that the Trial Court Abused Its Discretion by Failing to Require Weyerhaeuser to Prove that the Case Would Be Litigated in Arkansas.	4
1.	The Trial Court’s Dismissal Was Legally Erroneous Because Weyerhaeuser Did Not Prove that Arkansas Would Be the Alternative Forum.	4
2.	The Trial Court’s <i>Forum Non Conveniens</i> Balancing Analysis Was Meaningless When Weyerhaeuser Had Failed to Establish that the Case Would Be Litigated in Arkansas.....	6
3.	The Trial Court Abused its Discretion by Failing to Require Weyerhaeuser to Agree to Litigate in Its Proposed Alternative Forum.....	8
C.	Conditioning Dismissal on Weyerhaeuser’s Agreement to Litigate in Its Proposed Alternative Forum Raises No Constitutional Issue.	10
1.	This Court May Affirm the Court of Appeals Without Reaching Weyerhaeuser’s Supposed Constitutional Issues.....	11
2.	Requiring Weyerhaeuser to Litigate in Its Proposed Alternative Forum as a Condition of Granting Dismissal Does Not Implicate the Supremacy Clause.	12

3.	Requiring Weyerhaeuser to Litigate in Its Proposed Alternative Forum as a Condition of Granting Dismissal Is Not an Unconstitutional Condition.	14
D.	<i>Amici's</i> Arguments that the Pennsylvania MDL Is Adequate Are Irrelevant Here.....	17
III.	CONCLUSION	18

TABLE OF AUTHORITIES

Washington Cases

<i>Dix v. ICT Group, Inc.</i> , 160 Wn.2d 826, 161 P.3d 1016 (2007)	3
<i>Hill v. Jawanda Transport Ltd.</i> , 96 Wn. App. 537, 983 P.2d 666 (1999)	4, 9
<i>Johnson v. Spider Staging Corp.</i> , 87 Wn.2d 577, 555 P.2d 997 (1976).....	8
<i>Klotz v. Dehkhoda</i> , 134 Wn. App. 261, 141 P.3d 67 (2006)	5
<i>Myers v. Boeing Co.</i> , 115 Wn.2d 123, 794 P.2d 1272 (1990).....	3, 4, 6, 8
<i>Sales v. Weyerhaeuser Co.</i> , 138 Wn. App. 222, 156 P.3d 303 (2007)	passim
<i>State v. Royal</i> , 122 Wn.2d 413, 858 P.2d 259 (1993)	7
<i>Weiss v. Glemp</i> , 127 Wn.2d 726, 903 P.2d 455 (1995).....	11

Non-Washington Cases

<i>Barron v. Burnside</i> , 121 U.S. 186, 7 S.Ct. 931 (1887).....	14
<i>Ceramic Corp. of America v. Inka Maritime Corp.</i> , 1 F.3d 947 (9th Cir. 1993).....	9
<i>Doe v. Golden & Waters</i> , 173 S.W.2d 260 (Ky. App. 2005)	7
<i>Dolan v. City of Tigard</i> , 512 U.S. 374, 114 S.Ct. 2309 (1994)	14
<i>El-Fadl v. Central Bank of Jordan</i> , 75 F.3d 668 (D.C. Cir. 1996).....	4, 5, 9
<i>Garrity v. New Jersey</i> , 385 U.S. 493, 87 S. Ct. 616 (1967)	16
<i>Graham v. Smith</i> , 292 F. Supp. 2d 153 (D. Me. 2003).....	7
<i>Home Ins. Co. v. Morse</i> , 20 Wall. 445, 87 U.S. 445 (1874).....	14
<i>In re La Providencia Development Corp.</i> , 406 F.2d 251 (1st Cir. 1969)..	17
<i>Kline v. Burke Construction Co.</i> , 260 U.S. 226, 43 S.Ct. 79 (1922)	15, 16, 17
<i>Koslow v. Pennsylvania</i> , 302 F.3d 161 (3d Cir. 2002).....	14

<i>Libhart v. Santa Monica Dairy Co.</i> , 592 F.2d 1062 (9th Cir. 1979).....	16
<i>Lively v. Wild Oats Markets, Inc.</i> , 456 F.3d 933 (9th Cir. 2006)	12
<i>Lochner v. People of State of New York</i> , 198 U.S. 45, 25 S.Ct. 539 (1905)	15
<i>Mercier v. Sheraton International, Inc.</i> , 935 F.2d 419 (9th Cir. 1991).....	9
<i>Miera v. Dairyland Ins. Co.</i> , 143 F.3d 1337 (10th Cir. 1995).....	16
<i>Milk 'N' More, Inc. v. Beavert</i> , 963 F.2d 1342 (10th Cir.1992)	17
<i>Railway Express Agency, Inc. v. Virginia</i> , 282 U.S. 440, 51 S.Ct. 201 (1931)	16
<i>Ravelo Monegro v. Rosa</i> , 211 F.3d 509 (9th Cir. 2000).....	9
<i>Ruhrgas AG v. Marathon Oil Co.</i> , 526 U.S. 574, 119 S.Ct. 1563 (1999)	16
<i>Sablic v. Armada Shipping APS</i> , 973 F. Supp. 745 (S.D. Tex. 1997)	9
<i>Sanchez v. County of San Diego</i> , 464 F.3d 916 (9th Cir. 2006).....	14
<i>Terral v. Burke Construction Co.</i> , 257 U.S. 529, 42 S.Ct. 186 (1922)	15, 16
<i>Tosco Corp. v. Communities for a Better Environment</i> , 236 F.3d 495 (9th Cir. 2001)	12
<i>Vance v. Barrett</i> , 345 F.3d 1083 (9th Cir. 2003).....	14
<i>Wieser v. Missouri Pacific R.R. Co.</i> , 98 Ill.2d 359, 456 N.E.2d 98 (1983)	13

Other Authorities

<i>Federalism in the Taft Court Era: Can it Be “Revived?”</i> , 51 DUKE L.J. 1513 (2002).....	15
<i>Note, Unconstitutional Conditions</i> , 73 HARV. L. REV. 1595 (1960)	16
<i>Note, Welfare for Lobbyists or Non-Profit Gag Rule</i> , 47 SYRACUSE L. REV. 1065 (1997)	15

I. INTRODUCTION

The Court of Appeals required Weyerhaeuser to demonstrate that it would litigate in the forum that it proposed as more convenient. The Court of Appeals held that the proposed alternative forum – Arkansas – was not more convenient unless Weyerhaeuser backed up its argument with an agreement to litigate there. Because Weyerhaeuser “talked the talk” but failed to “walk the walk” by agreeing to litigate in its proposed forum, the Court of Appeals appropriately viewed Weyerhaeuser’s *forum non conveniens* motion as a charade in which Weyerhaeuser failed to meet its burden of proof.

Charles “Joby” Sales is a 22-year-old man who is dying from mesothelioma caused by asbestos fibers that his father, a Weyerhaeuser employee, unwittingly carried home on his work clothes and that Joby inhaled as a boy in the Sales’ home. He filed this case against Weyerhaeuser in Weyerhaeuser’s home state of Washington so that he might live to testify at his trial by preventing Weyerhaeuser from removing the case to federal court on diversity of citizenship grounds, and then transferring it to the asbestos Multi-District Litigation (“MDL”) in the Eastern District of Pennsylvania, where the case would languish until long after he died. *See Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 232-34, 156 P.3d 303 (2007).¹

¹ Mr. Sales willingly accepted the relative burden to his family of suing in Washington, and he has a valid basis for litigating against Weyerhaeuser in Washington where Weyerhaeuser has its corporate headquarters, where key corporate environmental safety decisions were made and where important witnesses – including both current and former Weyerhaeuser corporate employees – reside. *See* CP 199-201, 222-224, 249 & 275-276.

Mr. Sales demonstrated to the Superior Court that Weyerhaeuser would do just that. Through its strategic silence, Weyerhaeuser virtually admitted that Mr. Sales was right. *See Sales*, 138 Wn. App. at 234. In the face of that evidence, the Court of Appeals held that in order for Weyerhaeuser to secure dismissal on the basis that Arkansas is a more convenient forum, Weyerhaeuser should agree to litigate in the alternative forum that Weyerhaeuser proposed, which Weyerhaeuser refused to do.

This Court should affirm the Court of Appeals for a number of reasons. The Court of Appeals' decision follows established Washington law requiring a moving defendant to prove that its alternative forum is real, and authorizing courts to condition a *forum non conveniens* dismissal on a defendant's agreement to litigate in its proposed alternative forum. This Court also should reject Weyerhaeuser's attempt to elevate to "constitutional" status its strategy of preventing Mr. Sales from ever seeing his day in court. First, this Court can avoid addressing such supposed "constitutional" questions by affirming the Court of Appeals' reversal of the trial court's dismissal based on Weyerhaeuser's failure to meet its threshold burden of proof. The case would then proceed in Pierce County Superior Court where Weyerhaeuser has no right – constitutional or otherwise – to remove the case to federal court. Second, and in any event, Weyerhaeuser has no constitutional right of removal, and the Supremacy Clause and the "unconstitutional conditions doctrine" have no application here. The Court of Appeals simply held that in order to meet its burden of establishing the adequacy of its proposed alternative forum,

Weyerhaeuser was required to establish that the case would proceed there. To require less would subvert the purposes of the *forum non conveniens* doctrine and allow a corporate defendant to use the alleged “convenience” of a proposed alternative forum as a pretext to achieve impermissible ends. Accordingly, this Court should affirm the Court of Appeals’ decision.

II. ARGUMENT

A. Standard of Review.

The standard of review applicable to a decision to dismiss on *forum non conveniens* grounds is abuse of discretion. *Myers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990). In applying this standard, appellate courts defer to a trial court’s fact-specific determinations and apply *de novo* review to questions of law answered by the trial court. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833-34, 161 P.3d 1016 (2007). Thus, “[i]f the trial court’s ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.” *Id.* at 833.

Applying that standard of review, the Court of Appeals found that the record supported the trial court’s conclusion that Arkansas would be a more convenient forum than Washington if Arkansas were the forum where the case would be litigated. *Id.* at 231. At the same time, the Court of Appeals found that the trial court made a number of legal errors by granting dismissal without determining that Arkansas would in fact be where the case would be litigated, a problem that could have been solved

by Weyerhaeuser's agreement to litigate in the forum it had proposed as more convenient – Arkansas. *Id.* at 234.

B. This Court Should Affirm the Court of Appeals' Holding that the Trial Court Abused Its Discretion by Failing to Require Weyerhaeuser to Prove that the Case Would Be Litigated in Arkansas.

The trial court misapplied the governing law in a number of ways when it dismissed this case without requiring Weyerhaeuser to establish that its proposed alternative forum would be the real forum where the case would be litigated. Because Weyerhaeuser would not agree to litigate in Arkansas, and given the evidence in the record suggesting that Weyerhaeuser's true intent was to remove the case to federal court and then transfer it to the MDL in Pennsylvania, the Court of Appeals properly concluded that Weyerhaeuser had not established that Arkansas would be the real forum for litigation in the absence of an agreement by Weyerhaeuser to litigate there. *Sales*, 138 Wn. App. at 229.

1. The Trial Court's Dismissal Was Legally Erroneous Because Weyerhaeuser Did Not Prove that Arkansas Would Be the Alternative Forum.

A defendant seeking *forum non conveniens* dismissal must first prove that its proposed alternative forum is truly adequate. *Sales*, 138 Wn. App. at 228. As the Court of Appeals stated in *Hill v. Jawanda Transport*, “[a] defendant bears the burden of proving an adequate alternative forum exists.”²

² *Hill v. Jawanda Transport Ltd.*, 96 Wn. App. 537, 541, 983 P.2d 666 (1999) (citing *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996)); *id.* at 543 (“Once a

The trial court failed to require Weyerhaeuser to meet this burden. Indeed, the trial court expressly revealed its erroneous view of the governing legal standard when it stated that “the court must *first* do a balancing test with regard to the public and private interest factors that would affect each of the litigants.” Clerk’s Papers (“CP”) at 157 (emphasis added). Yet the balancing test to which the trial court referred should have occurred only after Weyerhaeuser met its threshold burden of proving that Arkansas was a real and adequate alternative forum – a burden it never even tried to meet.³

Thus, in failing to require Weyerhaeuser to meet its threshold burden of proving that Arkansas state court would be the real forum for litigation, the trial court plainly misapplied governing Washington law regarding a defendant’s burden of proof in a *forum non conveniens* motion.⁴

*defendant proves that another forum is adequate, the trial court must analyze and balance private and public interests”) (emphasis added); Klotz v. Dehkhoda, 134 Wn. App. 261, 265, 141 P.3d 67 (2006) (“In deciding whether to dismiss for *forum non conveniens*, the trial court **must** first determine whether an adequate alternative forum exists”) (emphasis added); see also *El-Fadl*, 75 F.3d at 676-77 (“In deciding a *forum non conveniens* motion, the district court **must** first establish that there is an adequate alternative forum . . . Only if there is an adequate alternative forum must the court then weigh the relative conveniences to the parties . . .”) (emphasis added).*

³ See CP 157-62 (trial court’s written decision dismissing on *forum non conveniens* grounds without conducting the required threshold analysis); see also Verbatim Report of Proceedings on July 28, 2006 (“RP”) 15-16 (trial court’s oral ruling denying reconsideration and stating that all the “traditional factors that the Court weighs have been evaluated in my written decision, and there’s nothing that the plaintiff has indicated at this point in time, other than to submit, I believe in good faith and with a sense of urgency[,] that this case potentially going to the federal system would have dire consequences to this plaintiff,” but concluding that “I simply do not see that as a legal basis for me to retain jurisdiction under the case law”).

⁴ See *El-Fadl*, 75 F.3d at 677 (*forum non conveniens* dismissal is an abuse of discretion if trial court “fails to consider a material factor . . . [or] does not hold defendants to their

2. The Trial Court's *Forum Non Conveniens* Balancing Analysis Was Meaningless When Weyerhaeuser Had Failed to Establish that the Case Would Be Litigated in Arkansas.

Only after a defendant meets its burden of establishing that a proposed alternative forum is a real and adequate alternative should the trial court weigh the relevant private and public interest factors.⁵ The trial court should not disturb plaintiff's choice of forum unless "the balance is strongly in favor of the defendant." *Myers*, 115 Wn.2d at 128-29 (1990). This balancing test requires that the trial court compare two forums—plaintiff's chosen forum and defendant's proposed alternative. Any weighing of the *forum non conveniens* factors is meaningless – as the Court of Appeals expressly held, *Sales*, 138 Wn. App. at 231 – if the case would not in fact be litigated in the proposed alternative forum.⁶

burden of persuasion on all elements of the *forum non conveniens* analysis"); *see also Demelash*, 105 Wn. App. at 530 (trial court "necessarily abuses its discretion if its ruling is based on an erroneous view of the law").

⁵ Under the balancing analysis, the court is to consider the following private interests:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Myers, 115 Wn.2d at 128. The public interest factors include administrative burdens placed on courts where actions do not originate; the burden of imposing jury duty on a community with no relation to the litigation; the interest in holding trials within the view and reach of those affected by a case; the local interest in having localized controversies decided at home; and the interest in trying a diversity case in the state that provides the applicable law. *Id.* at 129.

⁶ As the trial court stated in its written decision, it did not know "whether or not this case would be removed to Federal Court by the Defendant or what the status is of cases relating to this subject matter in the Federal system." CP 157 (trial court's written decision).

The trial court here compared Washington and Arkansas. The Court of Appeals found no fault with the trial court's fact-based determination that Arkansas would be a more convenient forum than Washington if indeed Arkansas were the real forum for litigation. Rather, the trial court's error was a legal one—it considered Arkansas as the alternative forum without requiring Weyerhaeuser to prove that this case would actually be litigated there and in the face of evidence suggesting that it would, in fact, be transferred by Weyerhaeuser to the MDL in Pennsylvania.⁷ The Court of Appeals held that the balancing test undertaken by the trial court was “meaningless” given that Weyerhaeuser had not agreed or established that it would litigate in Arkansas. *Sales*, 138 Wn. App. at 231. When the evidence strongly suggested that

⁷ In their reply brief to the Court of Appeals, respondents cited pleadings from the federal PACER database in the public record showing Weyerhaeuser's practice of removing asbestos cases from state to federal court and then transferring them to the MDL in Pennsylvania. *See, e.g., McCandless v. Weyerhaeuser Corp.*, U.S. District Court for Eastern District of North Carolina, Case No. 4:02-CV-124-H(4), Response to Weyerhaeuser Corp.'s Notice of Removal at 1-2 (“All claims are based upon claims of injury due to exposure to asbestos dust and fibers . . . brought home by employee-spouses . . . *Weyerhaeuser Corporation filed a notice of removal to federal court and also attempted to have the case transferred to the Eastern District of Pennsylvania . . . pursuant to [the] MDL Transfer Order*”) (emphasis added); *Abel v. A.O. Smith Electrical Products Co.*, U.S. District Court for Northern District of Alabama, Case No. CV-05-RRA-1483-S, Notice by Weyerhaeuser Company of Tag-Along Action at 1 (“The undersigned [Weyerhaeuser] notifies the Court that this case is a potential ‘tag-along action’ which may be subject to transfer to the [MDL in] Eastern District of Pennsylvania”). On March 14, 2007, the Court of Appeals' motion panel denied Weyerhaeuser's motion to strike these portions of the reply brief and it deferred the issue to the merits panel, which did not reach the issue. This Court may take judicial notice of these same public pleadings from the PACER database pursuant to ER 201 and RAP 9.11, and respondents request that it do so. *See State v. Royal*, 122 Wn.2d 413, 417-18, 858 P.2d 259 (1993) (taking judicial notice of analogous public court records); *Doe v. Golden & Waters*, 173 S.W.2d 260, 265 (Ky. App. 2005) (taking judicial notice of public court records from PACER database); *Graham v. Smith*, 292 F. Supp. 2d 153, 155 n. 2 (D. Me. 2003) (same).

Weyerhaeuser intended to litigate in *Pennsylvania*, how could a balancing of convenience factors between Washington and *Arkansas* be meaningful?⁸ The answer, as the Court of Appeals correctly held, is that it was not and could not be. *Id.*

3. The Trial Court Abused its Discretion by Failing to Require Weyerhaeuser to Agree to Litigate in Its Proposed Alternative Forum.

The Court of Appeals held that the trial court abused its discretion when it erroneously held that it lacked the judicial authority to require Weyerhaeuser to litigate in the forum it proposed as the more convenient forum. *Id.* at 232. It cannot be disputed that the trial court had the authority to require such a stipulation. As this Court observed in *Myers*, the doctrine of *forum non conveniens* allows courts “discretionary power to ‘[decline] jurisdiction where, in the court's view, the difficulties of litigation militate for the dismissal of the action *subject to a stipulation that the defendant submit to jurisdiction in a more convenient forum.*’” *Myers*, 115 Wn.2d at 128 (quoting *Werner v. Werner*, 84 Wn.2d 360, 370, 526 P.2d 370 (1974)).⁹

⁸ In addition, where, as here, a defendant has refused to stipulate to submit to its own proposed alternative forum and there is no evidence that the case will actually go forward there if the case is dismissed and re-filed in the alternative forum, it is simply not possible for the trial court to determine whether the “ends of justice” would be served by the requested *forum non conveniens* dismissal. See *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997 (1976) (ultimate question in *forum non conveniens* analysis is whether “the *ends of justice* would be better served if the action were brought and tried in another forum”) (emphasis added).

⁹ As the Court of Appeals noted, Weyerhaeuser conceded “that the trial court has discretion to condition dismissal on a defendant’s stipulation that it will submit to jurisdiction in the defendant’s proposed adequate alternative.” *Sales*, 138 Wn. App. at 232.

Whether the adequacy of the proposed alternative forum relates to the existence of subject matter jurisdiction,¹⁰ the availability of adequate relief,¹¹ the amenability of the defendant to suit,¹² the possibility that the defendant might plead a statute of limitations that lapsed after the case was originally filed,¹³ the probability of significant delay in the resolution of plaintiff's claims,¹⁴ or, as here, the likely transfer to a completely different forum for litigation, the fundamental inquiry for the trial judge remains the same—If I dismiss, can I be confident that the plaintiff will be able to try the case and obtain justice in the alternative forum that the defendant proposes?

Here, the trial court never asked that question because it did not believe it had the authority to do so. Yet the question lies at the heart of the *forum non conveniens* doctrine. Put simply, and as the Court of Appeals held, the trial court committed legal error because it never required Weyerhaeuser to show that its proposed alternative forum would be real, and it erroneously believed that it lacked the authority to condition

¹⁰ See *El-Fadl*, 75 F.3d at 677-79.

¹¹ See *Hill v. Jawanda Transport*, 96 Wn. App. at 542-43; *Ceramic Corp. of America v. Inka Maritime Corp.*, 1 F.3d 947, 949-50 (9th Cir. 1993), *Mercier v. Sheraton International, Inc.*, 935 F.2d 419, 424-26 (9th Cir. 1991).

¹² See *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000).

¹³ See *Werner*, 84 Wn.2d at 378.

¹⁴ See *Sablic v. Armada Shipping APS*, 973 F. Supp. 745, 748 (S.D. Tex. 1997) (“[T]he Court finds that Croatia, while it may be an available forum, is not an adequate forum in which Plaintiff may present his case . . . While it is possible for Plaintiff's case to be heard in the Croatian courts, there is likely a backlog of cases that could present a significant delay in the resolution of Plaintiff's case”).

dismissal on Weyerhaeuser's agreement to litigate this case in its proposed forum.

Rather than simply reversing the trial court and remanding the case for trial in Washington because of Weyerhaeuser's failure to establish that its proposed alternative forum would be the actual litigation forum, the Court of Appeals conditioned dismissal on Weyerhaeuser's agreement to litigate in its proposed forum. While Weyerhaeuser here suggests that its constitutional rights have been affronted by the Court of Appeals, it fails to appreciate that absent a showing by Weyerhaeuser that its proposed alternative forum was adequate and real (a showing that Weyerhaeuser never made), its *forum non conveniens* motion would simply be denied based on its failure to meet its threshold burden of proof, and the case would proceed in Washington, the forum chosen by Mr. Sales, where Weyerhaeuser has no right to remove, constitutional or otherwise.

C. Conditioning Dismissal on Weyerhaeuser's Agreement to Litigate in Its Proposed Alternative Forum Raises No Constitutional Issue.

Weyerhaeuser now claims that requiring it to agree to litigate in the forum it proposed somehow violates the Supremacy Clause and imposes an "unconstitutional condition." Petition at 10-13. This Court should not even reach such supposed constitutional arguments because, as demonstrated above, it need not do so to affirm the Court of Appeals. If it reaches these arguments, the Court should reject them because conditioning dismissal on Weyerhaeuser's agreement to litigate in its

proposed alternative forum implicates no constitutional question, in any event.

1. This Court May Affirm the Court of Appeals Without Reaching Weyerhaeuser's Supposed Constitutional Issues.

Weyerhaeuser's "constitutional" arguments arise solely from the Court of Appeals' decision to give Weyerhaeuser the opportunity to obtain its desired dismissal by agreeing to litigate in its preferred forum. As shown above, if the Court of Appeals had not extended that opportunity to Weyerhaeuser, then the necessary holding of the Court of Appeals – based on the trial court's legal errors – was to reverse the trial court's dismissal and remand for trial in Pierce County Superior Court. This Court "will not decide a constitutional issue unless it is absolutely necessary for the determination of a case." *Weiss v. Glemp*, 127 Wn.2d 726, 730, 903 P.2d 455 (1995) (quoting *State v. Zakel*, 119 Wn.2d 563, 567, 834 P.2d 1046 (1992)). Because the trial court legally erred in failing to require Weyerhaeuser to meet its burden of proving that Arkansas would be the real forum, this Court can simply affirm the Court of Appeals in this regard, and remand this case to Superior Court for trial in the forum chosen by Mr. Sales. In so holding, this Court will render irrelevant the supposed "constitutional" issues now raised by Weyerhaeuser to this Court.

**2. Requiring Weyerhaeuser to Litigate in Its
Proposed Alternative Forum as a Condition of
Granting Dismissal Does Not Implicate the
Supremacy Clause.**

The Court of Appeals' decision does not raise any true constitutional issues in any event. Weyerhaeuser contends that it has a federally-granted right to remove this action to federal court and that conditioning a *forum non conveniens* dismissal on its agreement to litigate in its proposed alternative forum offends the Supremacy Clause of the United States Constitution. Because Weyerhaeuser is a Washington corporation that was sued in Washington, it has no federal right, let alone a constitutional right, to remove this case to federal court.¹⁵ The question thus is whether the Supremacy Clause is offended when a defendant that has been sued in state court in its home state – where removal is barred by federal statute – is asked to agree to litigate in its proposed alternative forum as a condition for securing a *forum non conveniens* dismissal. Because Weyerhaeuser had no right to remove the case to federal court unless or until a *forum non conveniens* dismissal was first properly granted, the Supremacy Clause was not implicated by requiring it to agree to litigate in its proposed forum as a condition of obtaining such a dismissal.

¹⁵ See 28 U.S.C. § 1441(b) (case is not removable where, as here, defendant “is a citizen of the State in which such action is brought”). The purpose of removal based on diversity jurisdiction is “to provide a federal forum for *out-of-state* litigants where they are free from prejudice in favor of a local litigant.” *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 502 (9th Cir. 2001) (emphasis added). Thus, “[t]he need for such protection is absent . . . in cases where [as here] the defendant is a citizen of the state in which the case is brought.” *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006).

Were it otherwise, a defendant could secure a *forum non conveniens* dismissal under false pretenses through a “bait and switch” strategy, as Weyerhaeuser attempted here. The defendant could propose an alternative forum (say, Arkansas) and argue that that the proposed alternative was more convenient under the applicable convenience factors, all the while intending to remove the case to federal court and then transfer it to a completely different forum (say, the asbestos MDL in Eastern District of Pennsylvania) that the defendant never proposed and the trial court never analyzed as more convenient.¹⁶ Nothing in the Supremacy Clause requires any court to render *forum non conveniens* analysis into such a charade.

It is beyond dispute that conditions may properly be attached to *forum non conveniens* dismissals, including, for example, conditions requiring the waiver of substantive statute of limitations defenses. Yet under Weyerhaeuser’s approach, a state court could not require a defendant to waive a *federal* statute of limitations without offending the Supremacy Clause. Obviously, the law is otherwise. *See, e.g., Wieser v. Missouri Pacific R.R. Co.*, 98 Ill.2d 359, 373, 456 N.E.2d 98, 104-105 (1983) (conditioning dismissal on waiver of federal statute of limitations defense under FELA and giving leave to reinstate action if defendant refuses to waive or asserts the defense in subsequent action).

¹⁶ It should be noted that, in general, removal to federal court is *not* an issue in the *forum non conveniens* analysis. Only in situations involving the combination of removal and transfer to a different federal forum would removal undermine the basis for *forum non conveniens* dismissal.

**3. Requiring Weyerhaeuser to Litigate in Its
Proposed Alternative Forum as a Condition of
Granting Dismissal Is Not an Unconstitutional
Condition.**

The “unconstitutional conditions doctrine” holds that “the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the [right lost].” *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S.Ct. 2309 (1994) (holding that party could not be put to choice between a building permit and Fifth Amendment right to just compensation for a taking). To make out an “unconstitutional conditions” claim, Weyerhaeuser must show that a constitutional right has been infringed.¹⁷ Weyerhaeuser cannot do this because the right of removal is *statutory* – not constitutional – and federal courts strictly construe that statutory right *against* permitting removal.

Weyerhaeuser has cited primarily 19th Century cases of dubious modern significance¹⁸ to claim that it has a constitutional right to federal diversity jurisdiction. Petition at 12. The most modern case that Weyerhaeuser has cited is *Terral v. Burke Construction Co.*, 257 U.S. 529,

¹⁷ See *Sanchez v. County of San Diego*, 464 F.3d 916, 930-31 (9th Cir. 2006); *Vance v. Barrett*, 345 F.3d 1083, 1088 (9th Cir. 2003) (“As a prerequisite to discerning a constitutional violation for an unconstitutional condition or unconstitutional retaliation, however, we must first examine the validity of the underlying alleged constitutional rights.”).

¹⁸ See *Koslow v. Pennsylvania*, 302 F.3d 161, 173 (3d Cir. 2002) (describing cases cited by Weyerhaeuser as “select seminal-and dated-‘unconstitutional conditions’ cases, when the Supreme Court struck down states’ attempts to force certain litigants to waive immunity from suit in state court.” (citing *Barron v. Burnside*, 121 U.S. 186, 199, 7 S.Ct. 931 (1887) and *Home Ins. Co. v. Morse*, 20 Wall. 445, 87 U.S. 445 (1874)).

532, 42 S.Ct. 186 (1922).¹⁹ However, shortly after *Terral*, the United States Supreme Court decided *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 S.Ct. 79 (1922), where it made clear that there is no *constitutional right* to have a case heard in federal court.²⁰

The right of a litigant to maintain an action in a federal court on the ground that there is a controversy between citizens of different states is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right granted by the Constitution.

The effect of [the provision of Article II of the Constitution] is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.

¹⁹ The unconstitutional conditions doctrine developed during the *Lochner* era, see *Lochner v. People of State of New York*, 198 U.S. 45, 25 S.Ct. 539 (1905), in response to state legislation that imposed discriminatory conditions on foreign corporations, and, after the collapse of *Lochner* jurisprudence in the mid-1930s, the doctrine remained dormant for almost two decades. Note, *Welfare for Lobbyists or Non-Profit Gag Rule: Can Congress Limit a Federal Grant Recipient's Use of Private Funds for Political Advocacy?*, 47 SYRACUSE L. REV. 1065, 1077-78 (1997).

²⁰ See *Federalism in the Taft Court Era: Can it Be "Revived?"*, 51 DUKE L.J. 1513, 1639 n. 257 (2002) ("In *Kline* . . . the Court corrected Taft's enthusiastic implication that the right to resort to federal courts, whether by filing a cause of action or by removal, was a constitutional right.")

Id. at 233-34 (citations and footnote omitted); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S.Ct. 1563, 1570 (1999) (holding that issue of complete diversity of citizenship “rests on statutory interpretation, not constitutional demand”). Thus, to the extent that Weyerhaeuser relies on *Terral* to establish a constitutional right to removal, the United States Supreme Court – within months of that 85-year-old decision – clarified that no such constitutional right to removal exists, and Weyerhaeuser cites no more modern precedent supporting a different conclusion.²¹

Removal jurisdiction is thus derived not from the Constitution but rather “entirely from the statutory authorization of Congress,” and, what is more, “removal statutes are strictly construed *against* removal.” *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). Accordingly, “courts are rigorously to enforce Congress’ intent to *restrict* federal jurisdiction in controversies between citizens of different states.” *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1339 (10th Cir. 1995). In

²¹ *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616 (1967), which *amici* suggested stands for the proposition that the “Supreme Court continues to recognize the continuing validity” of *Terral v. Burke Const. Co.*, 257 U.S. 529, 532-33, 42 S. Ct. 188 (1922), dealt with the Fourteenth Amendment’s protection against the use of coerced statements, not the constitutional underpinnings (or lack thereof) of removal based on diversity of citizenship. *Garrity*, 385 U.S. at 500. The Supreme Court has never revisited its post-*Terral* decision in *Kline v. Burke Construction Co.*, 260 U.S. 226, 233-34, 43 S.Ct. 79 (1922), holding that there is no constitutional right to have a case heard in federal court. *See also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S.Ct. 1563 (1999) (holding that issue of complete diversity of citizenship “rests on statutory interpretation, not constitutional demand”); *Note, Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1609 (1960) (observing that *Terral* was further vitiated by *Railway Express Agency, Inc. v. Virginia*, 282 U.S. 440, 51 S.Ct. 201 (1931), which upheld a Virginia law that required foreign corporations to register as local corporations, thus destroying diversity and indirectly the foreign corporation’s right to remove).

short, a defendant's right, if any, to remove a case to federal court is statutory, not constitutional. *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1345-46 (10th Cir.1992). Consistent with these authorities, some courts refer to removal in diversity cases as a privilege, not a right. *In re La Providencia Development Corp.*, 406 F.2d 251, 252 (1st Cir. 1969).

D. *Amici's Arguments that the Pennsylvania MDL Is Adequate Are Irrelevant Here.*

Finally, *amici* argue that the MDL in Pennsylvania is an adequate alternative forum for Mr. Sales' case, and that the Court of Appeals misapplied the test for adequacy by failing to consider the adequacy of the MDL. *See* Brief of Boeing Company at 2-7; Brief of Coalition of Litigation Justice *et al.* at 3-5. Both of these argument imagine a different case than the one argued by Weyerhaeuser before the trial court. Neither the trial court nor Court of Appeals based its decision on the alleged adequacy of the MDL for the simple reason that Weyerhaeuser refused to "come clean" regarding its true intentions. The trial court considered only the relative convenience of Arkansas and Washington. *Id.* at 230. It made no findings regarding the MDL in Pennsylvania, because Weyerhaeuser did not propose that forum.

The Court of Appeals discussed serious problems inherent in the MDL, *id.* at 232-34, but because Weyerhaeuser did not propose the MDL as an alternative forum – and the balancing of convenience factors would have been *very different* if the MDL had been compared to Pierce County Superior Court – the Court of Appeals correctly did not address such a

question. The problems with the MDL – and the likelihood that Weyerhaeuser would transfer the case to the MDL – simply underscored the importance of requiring Weyerhaeuser to meet its burden of proving that its alternative forum – Arkansas – was real and not contrived.

What is significant here is that if the proposed forum is not the real forum, a court cannot conduct a proper balancing of the *forum non conveniens* factors as required under Washington law. The Court of Appeals *did not* find that the MDL or any forum was inadequate, but rather that “Weyerhaeuser failed to establish that Arkansas was truly an adequate alternate forum.” *Sales*, 138 Wn. App. at 234. Accordingly, this Court should put to the side the arguments of *amici* as irrelevant.

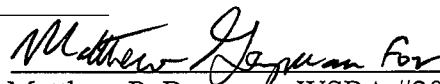
III. CONCLUSION

For all of these reasons, the Court should affirm the Court of Appeals’ reversal of the trial court’s *forum non conveniens* order and remand for trial in Pierce County Superior Court so that Mr. Sales can at last have his day in court.

DATED this 1st day of November, 2007.

Respectfully submitted,

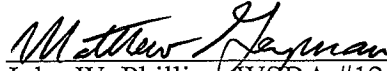
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I declare under the penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party to this action, competent to testify in this matter and that on November 1, 2007 I caused to be served one copy of Respondents' Supplemental Brief, as follows:

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